Transcon Lines *and* Transport and Local Delivery Drivers, Warehousemen and Helpers, Local Union No. 104, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 28-CA-5662

February 5, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On May 14, 1981, Administrative Law Judge Clifford H. Anderson issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

Unlike our dissenting colleague, we agree with the Administrative Law Judge's conclusion that the General Counsel has not established by a preponderance of the evidence that Respondent violated Section 8(a)(1) of the Act by discharging casual truckdriver James Haynes, Jr., on December 18, 1979. Thus, we agree with the Administrative Law Judge's findings that the General Counsel has not demonstrated that Respondent's termination of Haynes was motivated by its desire to defend against the EEOC charge that had been filed against the Company by employee Black rather than by its desire to enforce its legitimate rules regarding accidents. And, in so finding, we point out, as did the Administrative Law Judge, that Haynes admitted that he had been involved in a vehicle accident which was preventable by him. Furthermore, we emphasize that it is undisputed that Respondent, at all relevant times, maintained unambiguous written rules which provided for the immediate termination of a casual truckdriver involved in an accident which was preventable by that driver.

As found by the Administrative Law Judge, there is clearly no evidence to establish that Respondent had a pattern of granting exceptions to its accident rules and that, under the circumstances, the failure of Respondent's agent, Carl Johnson, to report Haynes' accident in accordance with Respondent's rules does not denigrate from this finding. Thus, with the exception of Johnson, the record is devoid of evidence that Respondent has ever declined to report or condoned, forgiven, or otherwise failed to act upon any accident which was preventable by a casual driver. Additionally, as noted by the Administrative Law Judge, Chetkauskas, Respondent's terminal manager, and Kentros, Respondent's chief of terminal operations, testified without contradiction that they both acted according to company procedures on all accidents and that they knew of no unreported or ignored accidents. As further noted by the Administrative Law Judge, Chetkauskas credibly testified that he would have acted as he did upon learning of Haynes' accident even if he had not discovered the pending EEOC charge. We further note that there is no evidence that Johnson's conduct in failing to act upon Haynes' accident was either pursuant to any real or apparent authority from Respondent. To the contrary, and as noted by the Administrative Law Judge, Johnson had for several months prior to the termination of his employment with Respondent displayed inattentiveness to his work and had generally been negligent in following Respondent's procedures regarding personnel matters, including accident recording. Therefore, unlike our colleague, we emphasize, as did the Administrative Law Judge, that substantive weight should not be accorded the fact that Johnson failed to report Haynes' accident as required by Respondent's rules.

Furthermore, contrary to our colleague, we do not regard as significant Chetkauskas' discussion with employees Walters and Westbrook wherein they alleged that Haynes had been involved in an accident. In this regard, we note Chetkauskas' position that he took no immediate action concerning the allegations of these employees since they made it clear that they had not witnessed the event and they further refused to reveal the identity of the person who they claimed had been a witness thereto. Under these circumstances, the allegations of Walters and Westbrook amounted to nothing more than rumor and we can draw no adverse inferences from Respondent's decision not to institute an investigation based thereon.

Finally, our dissenting colleague relies heavily on his view that the EEOC charge was "on [Chetkauskas'] mind" during the meeting with Union Business Agent Barton which was arranged for the purpose of discussing Haynes' termination. In this

[1] Since we agree with the Administrative Law Judge's conclusion that Respondent terminated James Haynes, Jr., because he violated Respondent's uniform rules against retaining probationary or casual drivers who have been involved in preventable accidents, we find it unnecessary to pass on the Administrative Law Judge's additional finding that James Black's action in filing an Equal Employment Opportunity Commission charge constituted protected concerted activity within the purview of the Act.

respect, our colleague emphasizes the fact that, during this meeting, Chetkauskas mentioned the EEOC charge more than once.[2] Even were we to find that the EEOC charge was, in fact, on Chetkauskas' mind during this meeting, that finding would not be controlling since it is undisputed that it was Respondent's investigation of the EEOC charge which prompted Haynes to admit his involvement in an accident and any discussion of Haynes' termination would therefore necessarily include some reference to the EEOC charge. Such a finding, however, would be insufficient to establish that Respondent acted unlawfully in discharging Haynes.

In sum, while we recognize, as did the Administrative Law Judge, that there exists some circumstantial evidence tending to discount the reason asserted by Respondent for its discharge of Haynes, such evidence cannot serve as proof of a violation. Rather, the General Counsel has the burden of establishing unfair labor practices by a preponderance of all the relevant evidence. Based on the record as a whole, we agree with the Administrative Law Judge that the General Counsel has not met his burden here.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

MEMBER JENKINS, dissenting:

Contrary to my colleagues and the Administrative Law Judge, I find that the facts surrounding Respondent's discharge of employee James Haynes, Jr., establish that the motivating cause for Haynes' discharge was the protected concerted activity of another employee, John Black. Accordingly, I find that Haynes' discharge violated Section 8(a)(1) of the Act. A full analysis of the facts reveals the following:

Respondent, the operator of a truck terminal, asserted that its policy is that all employees involved in vehicle accidents must report them to management, who in turn report them to the Company's safety office. Pursuant to Respondent's rules, a determination by its safety office that an accident was preventable by a casual truckdriver results, *inter alia*, in that driver's immediate termination.

In May 1979,[3] James Haynes, Jr., a white employee employed as a casual truckdriver, reported to Respondent's then chief of terminal operations, Carl Johnson,[4] that he had been involved in an accident which was preventable by him. Apparently, Johnson never reported the accident to any other official of Respondent. On December 10, Respondent hired Haynes as a permanent employee. In contrast, on or about October 12, John Black, a black employee who was also employed by Respondent as a casual truckdriver, was involved in an accident which Respondent classified as preventable by him. On October 15, Respondent, pursuant to its rule, discharged Black.

On December 12, 2 days after Haynes started full-time employment, two of Respondent's permanent drivers, Walters and Westbrook, told B. J. Chetkauskas, Respondent's terminal manager and the highest ranking management official at the plant, that there was a witness to Haynes' accident and that it was unjust for Respondent to have terminated Black, a black man, when Haynes, a white man, was retained despite the fact that both men had been involved in similar accidents. Chetkauskas admitted that he became "irate" at Walters and Westbrook because they had taken company time to alert him to a matter "that was [not their] concern . . . ." Chetkauskas testified that he then specifically told Walters, the employee who had done most of the talking, that the matter "didn't concern him . . . it was none of his business . . . [and] he had better get back to work." Chetkauskas did not investigate or take any other action concerning the report given by these employees.

Later that same day, Black filed a charge of race discrimination with the Equal Employment Opportunity Commission (EEOC) against Respondent. The charge alleged that Black was terminated because of his involvement in an accident while an unnamed white employee who had a similar accident was not terminated but, rather, was being considered for a permanent position.

Respondent was first notified of the existence of this charge on December 17 when Chetkauskas received a copy. While the charge did not mention Haynes, Chetkauskas immediately gave instructions to have Haynes report to his office "as soon as possible." Haynes, however, was absent from work that day and did not meet with Chetkauskas until his return to work the following morning. Although apparently not considered by the Administrative Law Judge, Chetkauskas admitted at the

[2] We are constrained to note that, during this meeting, Chetkauskas also specifically stated that Haynes' discharge resulted from his involvement in a preventable accident.

[3] All dates hereinafter refer to 1979.

[4] At the hearing, Haynes identified Johnson as his immediate supervisor and the Administrative Law Judge found that Johnson was Respondent's agent.

hearing that, soon after receiving notice of the pending EEOC charge, he telephoned Respondent's corporate office to discuss the EEOC charge.

Upon reporting for duty on the following morning, Haynes was again summoned to Chetkauskas' office where the latter asked him, *inter alia*, if he had ever had an accident while working for the Company. Haynes hesitated but then admitted, and related, the circumstances of his accident in May. The Administrative Law Judge found that Respondent's chief of terminal operations, Kentros,[5] who was also present, then attempted to coach Haynes into modifying his account of the accident by suggesting to him that he claim that the accident had occurred while he was working for another company. However, Chetkauskas interrupted and reminded Kentros that Haynes' report could not be changed because the meeting was being tape recorded. (The conversation had been recorded on a tape recorder that was prominently displayed.) Chetkauskas then discharged Haynes.

Later that day, Chetkauskas and the Union's business agent, Barton, met to discuss Haynes' termination. The record indicates that Chetkauskas immediately explained the facts surrounding the EEOC charge that had been filed by Black against the Company. While Chetkauskas told Barton that Respondent's rule on accidents was the ground for Haynes' discharge, Chetkauskas also told Barton about the discussion that he had had with Walters and Westbrook 6 days prior to receiving notification of the pending EEOC charge wherein they had reported Haynes' involvement in an accident. The Administrative Law Judge omitted entirely from his discussion the further testimony that during this meeting Chetkauskas revealed to Barton that only recently an EEOC charge filed by another employee against the Company had been resolved in favor of that employee. Furthermore, Chetkauskas agreed with Barton that Haynes' discharge was unfair. In this regard, Chetkauskas testified that he told Barton, *inter alia*, that, if he were Haynes, he would file NLRB charges and "scream it to the highest rooftop." The Administrative Law Judge also apparently failed to consider the evidence that in his report to his superior, dated December 18, Chetkauskas explained the circumstances surrounding Haynes' termination and additionally described the December 12 discussion that he had with Walters and Westbrook wherein they had, in essence, accused Respondent of race discrimination. Further, Chetkauskas attached a copy of the EEOC charge to this report.

[5] Johnson, who voluntarily resigned on August 2, was replaced by Kentros as chief of terminal operations.

The General Counsel contended that Respondent's discharge of Haynes violated Section 8(a)(1) of the Act. He argued that Respondent's termination of Haynes was motivated by its desire to defend against Black's EEOC charge rather than because of any legitimate interest in enforcing its rules regarding accidents. Although the Administrative Law Judge found that the Act would protect Haynes from any discriminatory action by Respondent motivated by the EEOC charge filed by Black, or by any discrimination intended to improve Respondent's defense to that charge, he declined to find that the discharge was for either of these reasons. In so doing, the Administrative Law Judge reasoned that, with the exception of Johnson, the evidence did not establish a pattern on the part of Respondent's agents of granting exceptions to its rules on accidents, and that Respondent should not be held bound by Johnson's decision to ignore or forgive Haynes' accident. He further found that Respondent's accident rules were uniformly applied since Chetkauskas and Kentros testified that, unlike Johnson, they acted consistent with company procedure whenever and however they learned of an accident. Further, the Administrative Law Judge apparently credited Chetkauskas, whose testimony was elicited in response to a leading question asked by the Administrative Law Judge, that he would have acted as he did upon learning of Haynes' accident on December 18 even if he had not discovered that Black had filed an EEOC charge. The Administrative Law Judge therefore concluded that Respondent had not violated the Act.

After considering the entire set of circumstances surrounding the discharging of Haynes, I am convinced that the reason asserted by Respondent for his discharge was pretextual and that the discharge was unlawful. Simply stated, Respondent's position that Haynes' discharge was based entirely upon the enforcement of its accident rules is contradicted by the evidence. Thus, the record is devoid of support for the Administrative Law Judge's finding that substantial weight should not be accorded Johnson's decision not to report Haynes' accident. Haynes identified Johnson as his immediate supervisor and, as found by the Administrative Law Judge, Johnson was an agent of Respondent. Indeed, Respondent admitted at the hearing that, as chief of terminal operations, Johnson was the second highest ranking official at the terminal. Moreover, undisputed testimony established that Respondent had delegated to its chief of terminal operations, *inter alia*, the specific task of receiving accident reports from employees. Neither Board law nor the law of agency requires that an employ-

er expressly authorize its agent's specific conduct. Thus, it is sufficient that, at the time that Johnson decided that Haynes' accident did not warrant further action, Johnson was an agent for whose conduct Respondent was responsible.

Respondent's position is additionally undercut by the fact that Chetkauskas declined to take action in response to the reports by Walters and Westbrook that Haynes had been involved in an accident. Indeed, Respondent was spurred to action only after being notified of the pending EEOC charge. Moreover, in light of the evidence that Respondent had direct knowledge that Johnson had on prior occasions been lax in enforcing its rules, it is significant that Chetkauskas, despite the report by Walters and Westbrook, not only failed to investigate the matter, but also irately told the employees that the matter was none of their business. Had Chetkauskas been genuinely concerned with acting in accordance with company procedure, as he contended, he undoubtedly would have been more receptive to the information offered by Walters and Westbrook and he certainly would have initiated some investigation in response thereto. This he did not do. Furthermore, any lingering doubt about Respondent's true motive is dispelled by the fact that, even after Haynes admitted to Chetkauskas and Kentros that he, in fact, had been in a preventable accident, Kentros attempted to coach him into retracting that admission. And this from an employer who claims that it strictly adheres to company procedures on all accidents and that it would have terminated Haynes upon learning of his accident irrespective of its knowledge of a pending EEOC charge.

Finally, the fact that the EEOC matter was very much on Respondent's mind is clear from the Administrative Law Judge's finding, which both the majority and I have adopted, that at the meeting immediately after Haynes' termination which was arranged for the purpose of discussing that termination with the Union, Chetkauskas, rather than dealing with Haynes' accident, spent an extraordinary amount of time telling Barton about the pending EEOC charge, the unrelated EEOC charge that had recently been resolved against the Company, and the earlier report from Westbrook and Walters concerning Haynes' involvement in an accident. Moreover, during that meeting, Chetkauskas agreed with Barton that Haynes had been unjustly discharged and encouraged Barton to protest that discharge by filing an unfair labor practice charge with the Board. Under the circumstances, the only explanation consistent with the facts is that Respondent's asserted reason for discharging Haynes was contrived and that Respondent is attempting to hide its true motivation for the discharge. Indeed, the true reason for the discharge is evident from the timing and manner in which it occurred. As detailed above, the record is replete with substantial and credible evidence that Respondent's discharge of Haynes was motivated by the race discrimination charge filed by Black with the EEOC and its desire to defend against that charge. I therefore conclude that Respondent's discharge of Haynes was violative of Section 8(a)(1) of the Act and I dissent from my colleagues' failure to so find.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge: This matter came to hearing before me on February 12, 1981, at Phoenix, Arizona, pursuant to a complaint and notice of hearing issued by the Regional Director for Region 28 of the National Labor Relations Board on August 7, 1980, based upon a charge filed by Transport and Local Delivery Drivers, Warehousemen and Helpers, Local Union No. 104, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein the Union, on January 10, 1980, against Transcon Lines, herein Respondent.

The complaint, as orally amended at the hearing, alleges that Respondent terminated its employee James E. Haynes, Jr. and thereafter refused to reinstate him because of his and other employees' protected concerted activities in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, herein the Act. Respondent admits the discharge and subsequent refusal to reinstate Haynes but denies that Haynes or any other employee or employees were engaged in protected concerted activities or that Haynes' discharge was for reasons other than the consistent application of permissible rules of employee conduct.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file post-hearing briefs.

Upon the entire record herein, including briefs from the General Counsel and Respondent, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT[1]

I. JURISDICTION

Respondent is now, and has been at all times material herein, a California corporation with an office in Phoenix, Arizona, where it is engaged in the business of interstate and local transportation of linehaul freight and other commodities. Respondent annually enjoys gross

[1] The facts were largely undisputed. Except where otherwise noted, these findings are based on the pleadings, admissions, stipulations of the parties, or uncontradicted credible testimonial or documentary evidence.

revenues in excess of $50,000 resulting from the transportation of freight and other commodities from the State of Arizona directly to points outside the State.

II. THE LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Events

1. *Background*

Respondent operates a terminal in Phoenix, Arizona, from which it picks up and delivers freight by truck. At all relevant times B. J. Chetkauskas was Respondent's terminal manager. Until August 1979, when he left Respondent's employ, Carl Johnson was chief of terminal operations—second in charge of the terminal. On August 2, 1979, Peter D. Kentros replaced Johnson and thereafter served as chief of terminal operations.

At all relevant times the Union has represented Respondent's terminal drivers and has entered into a series of collective-bargaining agreements with Respondent covering these employees. Respondent maintains a complement of permanent drivers. As its needs require, Respondent utilizes casual drivers who are procured through the Union's hiring hall. Although such employees may be repeatedly utilized, they are employed on a short-term or temporary basis. When a driver is hired as a full-time or permanent employee, he or she is subject to a probationary period. Probationary employees have lesser rights under the contract and under Respondent's rules of conduct than permanent employees who have completed their probationary period.

Respondent's policy is that all vehicle accidents must be reported by employees to management, who in turn report them to their safety office. Respondent has a separate office located in Oklahoma City, Oklahoma, which evaluates reported accidents and classifies them as preventable or not preventable by the driver. Striking a stationary object, absent mitigating circumstances, is a preventable accident. A determination that an accident was preventable results in the driver-employee being "charged" with the accident. Respondent's rules provide for differing actions against an employee charged with an accident: A nonprobationary permanent employee receives a warning letter stating that additional chargeable accidents may require greater discipline; a casual employee or a probationary employee is immediately terminated.[2]

2. The actions of Haynes prior to his termination

James E. Haynes, Jr., was employed by Respondent as a casual truck driver commencing in May 1979.[3] Save for the accident asserted as the cause of his termination, there is no dispute that throughout his employment with Respondent Haynes was considered an excellent employee and was highly regarded by Respondent.

In the latter part of May, while driving a truck for Respondent, Haynes scraped the top of his trailer against the eave of a building doing no apparent damage to the building but making a slight scratch in the skin of the trailer. Haynes immediately notified the appropriate agent of the building owner at the site, who after inspecting the eave told Haynes the incident was of no consequence and to forget it. When Haynes returned to the terminal he reported the accident to Johnson who inspected the trailer with Haynes and told him the matter did not warrant further action. Apparently Johnson never reported the incident to any other agent of Respondent. There is no contention that Haynes' conduct following the accident either in reporting to the building agent or to Johnson was other than in full accord with Respondent's required procedures.

Haynes was informed on December 7, 1979, that his work was good and that he was to be made a permanent employee on December 10. Commencing on December 10 until his termination on December 18, 1979, Haynes worked without event as a full-time employee for Respondent although in his probationary period.

3. The EEOC allegation, its investigation, and Haynes' termination

John D. Black, a black man, had been employed as a casual employee by Respondent. Apparently on or about October 12, he had an accident involving the separation of his tractor from its trailer which Respondent classified as chargeable against him. Respondent discharged Black on October 15 for that reason and did not thereafter reemploy him. Black contacted David M. Barton, the Union's assistant business agent, regarding his discharge; however, the Union after contacting Respondent determined nothing could be done on Black's behalf.

On or about December 12, soon after the commencement of the work shift, Chetkauskas was approached in his office by two of Respondent's employees who told him it was unjust for Respondent to have fired Black, a black man, when Haynes was retained even though Haynes, a white man, had had an accident similar to Black's accident. The men professed to have a witness to Haynes' accident whose name they would not divulge. Chetkauskas told the employees the matter was none of their concern and, since they were talking to him on company time, they should return to work. Chetkauskas took no immediate action on the matter.

That same day Black filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) against Respondent alleging his discharge in October was because of his race. The charge contained the following assertion:

> My accident on October 12, 1979, was mechanical while a similarly situated White employee had the identical accident through negligence on October

[2] Respondent produced substantial credible and essentially unchallenged testimony and documentation of the existence of the rules and their application to reported accidents.

[3] All dates hereinafter refer to 1979 unless otherwise indicated.

15, 1979, and was allowed to complete his 30 days probation to be considered on a permanent basis.

A copy of this charge was received by Chetkauskas on December 17. It was his first notification of the existence of the charge. Chetkauskas, thinking the charge reference to the similarly situated employee referred to Haynes, tried to talk to Haynes that same day but Haynes could not be reached. The next morning, December 18, Haynes was summoned to Chetkauskas' office where he spoke with Chetkauskas and Kentros. Their conversation was openly recorded on Respondent's tape recorder. Chetkauskas asked Haynes if he had ever had an accident involving a separation from a tractor. Haynes said no. Chetkauskas then asked Haynes if he had ever seen anybody damage Respondent's property. Haynes said no. Chetkauskas then asked if Haynes had ever had an accident with Transcon. Haynes said no, hesitated a moment, and then related the circumstances of the May events described above.

Chetkauskas told Haynes that company policy provided that if a casual employee has an accident that employee cannot thereafter be employed by Respondent. Kentros asked Haynes if the accident had perhaps occurred when he was driving for another company. Before Haynes could answer Chetkauskas told Kentros—pointing to the running tape recorder—that Haynes' remarks were on tape including the statement that he had reported the accident to Johnson. Chetkauskas told Haynes that Respondent could not use him anymore and that he was terminated. The meeting ended.[4]

4. Post-termination events

Haynes left Respondent's premises after his termination and reported the events to Barton at the union office. Barton phoned Chetkauskas and a meeting was arranged for that afternoon. Chetkauskas, Barton, and Haynes met at Chetkauskas' office. Almost immediately Haynes was asked to step outside and did so. Barton and Chetkauskas continued the meeting alone.

Chetkauskas told Barton of the EEOC charge, the two employees who had earlier confronted him regarding the matter, and his meeting with Haynes in which Haynes had admitted he had had an accident. The two men disagreed on the propriety of Haynes' termination. Barton asserted that Haynes was being used as a "sacrificial lamb" and that "the whole thing stinks." Chetkauskas agreed that it might be unfair but that the matter was out of his hands. Barton several times claimed the discharge was not because of the accident. Chetkauskas rejoined on each occasion that casuals who had accidents could not be used by the Company and that this rule was the reason for Haynes' discharge.

Barton again asserted that Haynes was being denied his rights and that charges would be filed against the Company with the NLRB and EEOC Chetkauskas responded that he did not disagree with Barton's assertions of injustice and that, if he were Haynes, he would file NLRB charges and "scream it to the highest rooftop." Chetkauskas suggested Barton try and secure other employment for Haynes but Barton asserted he would obtain the return of Haynes to his employment with Respondent. The conversation then turned to Haynes' work qualities. Chetkauskas made reference to the uniformly good attributes of Haynes and offered to recommend Haynes for employment elsewhere. Haynes was brought in to the meeting at this point. Barton explained his own position regarding the dispute and that he was going to file a grievance on Haynes' behalf and inquire into the possibility of EEOC and NLRB charges. The meeting ended.[5]

On January 24, 1980, the State of Arizona's department of law, civil rights division issued a no cause order on Black's charge after investigating the matter pursuant to the deferral procedures of the Equal Employment Opportunity Commission. The order stated there was no reasonable cause to believe an unlawful employment practice had occurred as alleged and dismissed the charge.

A grievance was filed by the Union concerning Haynes' discharge which came before the Joint State Committee for the Trucking Industry of Arizona and New Mexico (the Committee)—the dispute resolution forum established under the contract—on or about January 28, 1980. The minutes of those proceedings reflect that the Union presented the argument to the Committee that Haynes was discharged because he was a union member and because of "reverse discrimination due to the circumstances surounding his termination." In support of its argument the Union presented to the Committee the factual background resulting in Haynes' termination. Respondent asserted that in investigating the merits of the EEOC complaint it first determined Haynes had had an accident and then applied its firm policy not to employ casuals who had had a chargable accident. The Committee decision minutes contain the following resolution:[6]

> The motion was made and seconded that there is no violation of Article 41; therefore, the termination of Mr. Haynes is proper. The motion carried.

[4] These findings are a composite of the essentially corrobative versions of each participant in the conversation. Two points were in dispute. First, Chetkauskas and Kentros testified that there was a break in the meeting during which time Haynes was asked to leave the room and Chetkauskas consulted by telephone with his Los Angeles based industrial relations department. Haynes did not recall such a hiatus. Each witness exhibited a sound demeanor. The telephone call is not implausible for Chetkauskas may well have sought guidance in this unforseen situation. Such an occurrence is not likely to be incorrectly recalled by an honest witness. Since Haynes may have simply forgotten the interruption, I credit Chetkauskas and Kentros and find that the telephone call occurred as they described. Second, Haynes denied that he ever told Respondent's agents in this meeting that he knew of a company rule that an accident by a probationary or casual employee required his discharge. While this remark was attributed to Haynes by Kentros, Chetkauskas does not corroborate Kentros on this point nor does the written statement of Chetkauskas' or Kentros' own minutes of this meeting.

[5] These findings are based upon the credited testimony of Barton. Barton had a sound demeanor and demonstrated a detailed recollection of events. Chetkauskas had essentially no recollection of the details of this conversation but what he did recall generally corroborated Barton. While there is some evidence Kentros was present briefly at the conclusion of the conversation, he did not testify concerning this conversation.

[6] Insofar as the record reflects, the minutes are the only written record of the Committee's ruling or the basis of its decision.

Article 41(a) of the current collective bargaining agreement states in part that during an employee's probationary period:

> [H]e may be discharged without further recourse, provided however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members.

B. *Analysis and Conclusions*

1. The threshold issue—deferral to the determination of a contractually established grievance resolution procedure

Respondent urges deferral of the instant case to the ruling of the contractually established Committee under the Board's doctrine established in *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955). The General Counsel opposes such deferral. Each party argues its position is consistent with the Board's holding in *Suburban Motor Freight, Inc.*, 247 NLRB 146 (1980). In that case the Board, overruling prior law, stated:

> In specific terms, we will no longer honor the results of an arbitration proceeding under *Spielberg* unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator. In accord with the rule formerly stated in *Airco Industrial Gases*,[7] we will give no deference to an aribration award which bears no indication that the arbitrator ruled on the statutory issue of discrimination in determining the propriety of an employer's disciplinary actions.

In the instant case the minutes of the Committee's decision state only that Haynes' discharge was not in violation of article 41 of the collective-bargaining agreement, which article only protects against employer discrimination based on employee union membership or discrimination based on contract evasion. Neither subject is the specific issue herein. The decision does not indicate that the protected concerted activity theory of the General Counsel advanced in the instant case was in any way considered by the Committee. There being no evidence that the Committee ruled on this statutory issue,[8] it follows that no deference may be paid to its holding. Accordingly, I decline to defer to the award and shall turn to the merits of the case.

2. The discharge on its merits

The General Counsel's case may be roughly divided into two elements. The first element is the legal argument that Haynes was protected by the Act from discrimination against him intended to improve Respondent's defense to Black's charge. The second element of the General Counsel's case is the factual argument that Respondent discharged Haynes not because of his accident but rather because of Black's EEOC allegation. The elements and Respondent's defenses thereto are considered separately.

a. *Do the protections of the Act apply to single employees who file charges with the EEOC and, if so, do these protections extend to other employees to protect them against employer discrimination motivated by the EEOC charge?*

The General Counsel argues that the filing by Black of the EEOC charge is protected concerted activity under the Board's recent articulated constructive concert doctrine which attributes a collective or concerted purpose to single employee actions in dealing with governmental agencies concerning employment regulations.[9] The General Counsel then analogizes such protected activity to the situations where an employer illegally discriminates against otherwise uninvolved employees in an attempt to conceal other discrimination against union activity. A second discharge to hide an initial illegal discharge is also illegal.[10] The General Counsel also calls attention to the Board's decision in *Sioux City Foundry*, 241 NLRB 481 (1979), as persuasive of his position. Following the General Counsel's theory here the Board found in that case that an employer discharged two employees in violation of Section 8(a)(1) of the Act when it fired them for the purpose of avoiding or defending against an unrelated job applicant's threats to file charges with the EEOC. The Board found the single job applicant's threat to file sexual discrimination charges with the EEOC constructively concerted and hence protected activity. That protection extended to the two individuals whose terminations were undertaken by the employer in an attempt to meet the threatened EEOC charges.

Respondent defends against the General Counsel's argument by noting the statement by the General Counsel at the hearing that the Government's theory is dependent on the continuing vitality of the constructive concert theory of *Alleluia Cushion* and its progeny. Respondent notes that this Board doctrine has been rejected by various courts of appeals including the Ninth Circuit in whose jurisdiction this action lies. Thus, argues Respondent, the General Counsel has conceded his case rests on a doctrine specifically rejected by the Ninth Circuit. Second, Respondent notes that the protections which may arguably extend to Black in filing his charge with the EEOC do not necessarily attach to Haynes who did not himself engage in or have any connection to conduct protected by the Act. Nor, in Respondent's view, would employee Section 7 rights be chilled were discrimination of the type contended by the General Counsel to have occurred. This is so, Respondent asserts, because the person whose activities are to be protected—the filer of the EEOC charge—has "no common interests or sympa-

[7] *Airco Industrial Gases—Pacific, a Division of Air Reduction Company, Incorporated*, 195 NLRB 676 (1972).

[8] Respondent argued that the fact that the Committee, contrary to normal practice, met several times during the hearing of the dispute, supports the inference that the General Counsel's theory was considered. I reject this view. I rely only on the decision itself and decline to infer from circumstances that a particular argument was considered, and ruled on, *sub silentio*, by the Committee.

[9] See the fountainhead case, *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975), and its progeny.

[10] The General Counsel cites: *Jack August Enterprises, Inc.*, 232 NLRB 881 (1977); *Armor Industries, Inc.*, 227 NLRB 1543 (1977), and *Haynie Electric Co., Inc.*, 225 NLRB 353 (1976).

thies" with those who might be adversely affected by the employer. Thus, here, Black is not aligned in interest with Haynes.

For the reasons hereinafter stated, I agree with the General Counsel that the protections of the Act extend to shelter uninvolved employees from discrimination by employers motivated by discrimination charges filed with government agencies by single employees alleging discrimination based on race.

I reach the above result guided by the general principles contained in the cases cited by the General Counsel and, more particularly, due to the holding of the Board in *Sioux City Foundry, supra*. The legal theory of that case differs from the theory asserted by the General Counsel in the instant case only in that (1) the initiating protected action was a threat to file a discrimination charge by a job applicant, not the actual filing of a charge and, (2) the discrimination allegation involved sex rather than race. These differences are of no legal consequence. The filing of a charge with a government agency is no less protected than the threat to do so. Employees and job applicants are equally protected by the Act. Finally, the Board makes no distinction between racial and sexual discrimination but finds the protest of each to be protected activity in appropriate situations. Without addressing Respondent's assertions regarding the degree of acceptance of the Board's constructive concert theory in the courts of appeals, it is sufficient to note that as an administrative law judge I am bound to follow Board precedent which has not been reversed by the Supreme Court. *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1965). Accordingly, it is appropriate to turn to the second element of the General Counsel's case, the issue of Respondent's motive in terminating Haynes.

b. *Was Haynes' discharge motivated by Black's EEOC charge?*

In examining the evidence adduced by the General Counsel in support of its discharge allegation, it is important to note what the General Counsel is not arguing. It is undisputed that Respondent fired Haynes based upon its interrogation of him as part of its investigation of the EEOC charge filed by Black. It is reasonable to believe that Respondent would not have learned of Haynes' May accident as opposed to the contended later accident had it not been for Black's charge and the subsequent investigation. If the General Counsel were arguing that information gained in the investigation of an EEOC charge could not be the basis of actions against other employees, i.e., some form of immunity, then the General Counsel would be arguing for an automatic violation here irrespective of Respondent's motives.[11] Rather the General Counsel is arguing that Respondent took the action it did, not because of any legitimate interest in enforcing its rules regarding accidents, but rather because of Black's charge. The General Counsel's theory then depends on a finding that the motive of Respondent in discharging Haynes was to defend against Black's charge rather than other legitimate business reasons such as enforcing its rules concerning employees who have accidents. Respondent argues that its discharge of Haynes was based entirely upon its uniform enforcement of permissible rules of employee conduct.

Respondent at all relevant times had unambiguous rules concerning employee vehicle accidents. Its Oklahoma City, Oklahoma, safety division evaluates accidents reported to it by Respondent's various terminals and renders a judgment on whether they are "chargeable" to the driver because they were preventable. There is no doubt and I find that Respondent's rules, which require the termination of casual and probationary employees who have chargable accidents, are not impermissible rules of employee conduct. It follows therefore that if Respondent terminated Haynes because of his violation of the rules and not because of Black's EEOC charge, his discharge is not impermissible.

The General Counsel's argument does not challenge the validity of Respondent's rules but rather disputes their application to the Haynes events. In his brief counsel for the General Counsel calls Haynes' accident "extremely minor" and adds:

> Such an "accident" could not seriously be envisioned by the Respondent as the type of accident which would constitute a dischargable offense.

The General Counsel buttresses his argument by noting that when the accident was reported to Johnson, Respondent's admitted agent, he told Haynes no further action was warranted and did not require Haynes to fill out an accident report. The General Counsel further argues that Respondent's concern on December 18 was the EEOC charge rather than the May accident. He notes that Chetkauskas dismissed the report by the two employees of the occurrence of a preventable accident by Haynes without even a cursory investigation at a time when he had not yet had notice of the EEOC charge. It was only when the charge was received, the General Counsel argues, that Respondent became interested in an accident by Haynes.

Respondent introduced evidence showing it has regularly enforced its rules regarding accidents. Each accident declared preventable by Respondent's Oklahoma City office in recent times was the basis of subsequent employee discipline consistent with Respondent's rules. Some of these accidents were relatively minor in terms of physical damage to vehicles. No written rule addresses the question of minor accidents. While the Oklahoma City office did not have an opportunity to rule on the Haynes accident, for Chetkauskas fired Haynes immediately upon learning of the accident from him, the record is clear and I find that any accident involving striking a building[12] would have been classified by Oklahoma City as a preventable accident and that Chetkauskas so knew when he fired Haynes.

[11] Nor would such an argument if made have prevailed. The Board has specifically ruled that even testimony in an unfair labor practice hearing may provide the basis of not otherwise improper adverse action against a wrongdoing employee. *Los Angeles County District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Electronic and Space Technicians Local 1553, AFL-CIO (Hughes Helicopters, Division of Summa Corporation)*, 224 NLRB 350 (1976).

[12] No issue of mechanical failure was raised.

To meet the General Counsel's arguments that Haynes accident did not rise to the level of a reportable accident Respondent introduced two types of evidence. First it elicited uncontradicted evidence that Johnson, during the period from May, the month of Haynes' accident, until his separation from Respondent in August, was lax and inattentive to his work particularly as to paperwork and procedure. Respondent also demonstrated that Johnson had not followed approved procedures as to personnel matters such as attendance recordkeeping and accident reporting. I find this evidence persuasive of the proposition that Johnson was negligent in following Respondent's procedures and that no substantial weight should be accorded the fact that Johnson did not report Haynes' accident consistent with procedure. Johnson was not doing what was required by Respondent. No pattern of granting exceptions to the rules is thus established. Second, Respondent showed its accident rules were uniformly applied. Repondent's agents Chetkauskas and Kentros testified without contradiction that each reported and acted according to procedure on all accidents they learned of by whatever means and that they knew of no unreported or ignored accidents. Chetkauskas also testified that he would have acted as he did on learning of Haynes' accident on December 18 irrespective of the circumstances of the discovery—EEOC charge or not.

It is not implausible that an employer's agents would let pass unreported minor transgressions which violated the letter but not the spirit of a company rule. This may be particularly true where the rule, if invoked, could be foreseen as requiring a draconian punishment out of all apparent proportion to the transgression. If such is the case here, i.e., Haynes' accident was a minor matter not worthy of formal treatment which would cause Haynes' discharge, Respondent's later invocation of the accident rule during the EEOC investigation would indicate the asserted reason for the discharge was pretext. Such an overreaction to an event earlier forgiven would not be a normal or customary act but rather the exaggerated and defensive manifestation of an employer determined to defend itself against an EEOC charge by creating, *post hoc*, a strict, invariable rule against accidents, however minor. The General Counsel's evidence, noted *supra*, tends to support this view. So, too, do the statements of Chetkauskas to Barton immediately after Haynes' termination that Chetkauskas too would protest the termination in similar circumstances. Further, Chetkauskas spent a great deal of time telling Barton about the EEOC charge rather than dealing exclusively with Haynes' accident, thus revealing the EEOC matter was much on his mind.

It may also be argued that Chetkauskas did not fire Haynes because of a motivation to defend Respondent against the EEOC charge, but rather because Haynes' report of the accident was made at a time when his remarks were being recorded on tape and, presumably, the tape would be subject to review by higher officials in other locations as part of their investigation of the EEOC charge. Minor matters could perhaps be forgiven at the local level, but Respondent's agents outside the terminal could not with confidence be expected to be forgiving to either the driver or the agent who failed to rigidly apply the rules. Chetkauskas thus would feel compelled to fire Haynes because the accident report was not subject to be ignored with the confidence that no one outside the terminal would ever learn of the matter. Under this analysis, it was the presence of the tape recorder and the official nature of the EEOC inquiry which caused Haynes' accident to be treated as a rule violation rather than ignored or forgiven—Haynes was fired because he had the misfortune to speak at the wrong time. This scenario is supported by Chetkauskas' remarks to Kentros in the termination meeting. Kentros attempted to coach Haynes into modifying his earlier report of the accident by claiming the accident occurred while working for another employer. Chetkauskas interrupted and, pointing to the running tape recorder, noted that Haynes' report could not be changed because it was on tape. Such a motive by Chetkauskas would explain his remarks to Barton in which he agreed with Barton's protestations of injustice in Haynes' discharge but asserted the matter was out of his hands.[13]

What is critically lacking in the General Counsel's proof as to either discharge theory, however, is even a scintilla of evidence that any accident, however minor, was condoned, forgiven, or otherwise unreported or not eventually acted upon by Respondent's agents save Johnson. Respondent has done all it could to prove the negative proposition that it allowed no exceptions in the application of its accident rules other than unwillingly and unknowingly through the unreliable Johnson. Respondent's witnesses credibly testified that they knew of no exceptions allowed under the rules. Respondent produced substantial documentation showing that its accident reporting procedures are regularly utilized and the rules uniformly applied. Thus, while the General Counsel has adduced some circumstantial evidence tending to discount Respondent's assertions, the General Counsel offered no direct evidence of exceptions to the accident reporting and rule enforcement procedures other than through Johnson. If Repondent has condoned or forgiven accidents by employees of the type Haynes described to Chetkauskas, employees or other witnesses or records should have been produced by the General Counsel to so indicate. Evidence of a minor accident ignored or forgiven would have been direct evidence of a *de minimis* or threshold standard required to trigger Respondent's enforcement of the rules. Without such evidence, on this record, I cannot but find that Respondent has established by a preponderance of the evidence that its rules were uniformly enforced and that Chetkauskas would have taken the action he did in firing Haynes under any circumstances whether or not the EEOC charge had been filed against Respondent. The General Counsel's circumstantial evidence does not meet Respondent's evidence

[13] Since this latter view of the facts was not argued by the General Counsel, it is not clear whether the General Counsel's theory of a violation includes the situation where Haynes was terminated not because of the contentions of the EEOC charge but rather because his disclosure of the accident occurred during the investigation of the EEOC charge and therefore was treated formally and was not excused or forgotten as it would have been if the accident was revealed in another context. In view of my additional findings, *infra*, it is unnecessary to decide if such a factual resolution supports a violation.

here. Even assigning the burden of proof to Respondent on this issue, I find that Respondent, through Chetkauskas, would have terminated Haynes upon learning of the accident as Haynes reported it to him on December 18, 1979, even if Black had never filed his charge with the EEOC.[14] I find therefore that the termination of Haynes was not because of the protected concerted activity of Black. Thus, no violation of Section 8(a)(1) of the Act has occurred as alleged in the complaint. Accordingly, I shall dismiss the complaint in its entirety.

C. *Summary*

I have considered Respondent's motion to defer this matter to the Committee decision rendered under the contractually established grievance resolution process. I have declined to defer because of my determination that the Committee decision did not indicate on its face that the Committee had considered the statutory issues here presented in reaching its decision. I have determined that Black's action in filing an EEOC charge constitutes protected concerted activity within the purview of the Act which protection extends to all those who might suffer discrimination motivated by Respondent's desire to defend against the charge. Such protection applies to protect Haynes from discrimination by Respondent motivated by Black's charge. Notwithstanding all of the above, I have also found that Respondent fired Haynes because he violated Respondent's permissible and uniformly enforced rule against retaining probationary or casual drivers who have had a preventable accident. Therefore, I have found the allegations of the complaint are without merit and should be dismissed.

Upon the foregoing findings of fact and the entire record herein I make the the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent did not commit any unfair labor practices as alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[15]

The complaint shall be, and it hereby is, dismissed in its entirety.

[14] Such a determination precludes the necessity of deciding if the General Counsel's evidence rises to the level of a *prima facie* case of illegal motivation. This is so for, even if such a case is made, a subsequent conclusion that Respondent would have taken the action it did even in the absence of the protected activity requires a finding that the activity was not illegal. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

[15] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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